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No. 411

# Supreme Court of the United States

OCTOBER TERM, 1947.

JAMES M. GORDON, *Petitioner*,

v.

KENYON J. SCUDDER, Superintendent of the California Institute for Men Located at Chino, California.

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

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### OPINION BELOW

The order and the memorandum of conclusions of the district court (R. 88-98) are not officially reported. The opinion of the circuit court of appeals (R. 121-125) is not yet reported.

### JURISDICTION

The judgment of the circuit court of appeals was entered August 26, 1947 (R. 126). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

**QUESTIONS PRESENTED**

1. Whether a person confined by a state in violation of the Constitution of the United States who has duly petitioned the highest court of the state for a writ of habeas corpus and such court has denied the petition without opinion and without indicating its reason for denial must, to exhaust his state remedies, apply to this Court for a writ of certiorari before petitioning a United States district court for a writ of habeas corpus.

2. Whether, when a state provides for an absolute right of appeal in a criminal case to an intermediate appellate court, but provides for appeal to the highest state court only when the highest court orders that the case be transferred to it, and the highest court uniformly follows the rule that it will not go behind the statement of facts contained in the opinion of the intermediate court if such opinion contains a correct statement of the law based upon the facts related therein, the due process of law and the equal protection of the laws guaranteed by the Fourteenth Amendment are denied when the intermediate court in its opinion makes a palpable and patent misstatement of the facts appearing in the record, thereby precluding possibility of correction by the highest court and denying to a particular defendant the substance of review accorded generally by the state.

3. Whether Section 182 of the Penal Code of California as applied to petitioner is so vague, indefinite and uncertain as to deprive him of the due process of law and equal protection of the laws guaranteed him by the Fourteenth Amendment.

4. Whether, when the minimum and maximum sentence to which a defendant is subject varies depending upon the statutory clause on which his conviction is predicated, and it is impossible to determine from the proceedings which clause the conviction is predicated upon, it violates the due process of law and equal protection of the laws guaranteed

by the Fourteenth Amendment for the court to adjudge that defendant be punished by imprisonment "for the term prescribed by law", thus authorizing the Adult Authority, a non-judicial body, to assign a sentence specified by the statutory clause providing the most onerous minimum and maximum sentence.

5. Whether, under the circumstances of this case, petitioner was denied the due process of law guaranteed him by the Fourteenth Amendment in that evidence of purported crimes of which petitioner was not accused was admitted over petitioner's objection and was designed to prejudice and did prejudice the jury against petitioner.

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The California constitutional provisions and statutes involved are set forth in the Appendix, *infra*, pp. 16-18.

## STATEMENT

### A. The Present Proceeding.

This case was initiated in the United States District Court, Southern District of California, by filing a petition for habeas corpus dated December 5, 1946 (R. 2-30). An order to show cause was issued (R. 87). On March 4, 1947, the district court entered an order discharging its order to show cause and denying the petition for habeas corpus (R. 93-97).[1] The respondent was not required to answer to the merits of the petition and the district court made no findings thereon (R. 88-97). Petitioner's application under 28 U. S. C. A. 466 for a certificate of probable cause for appeal to the circuit court of appeals was denied by the district judge on March 4, 1947 (R. 106), but was granted on March 13, 1947, by a Judge of the United States Circuit Court of

[1] Previously, on February 14, 1947, the district judge had filed a "Memorandum of Conclusions" as to why the petition for the writ should be denied (R. 88-92).

Appeals for the Ninth Circuit, the Honorable Albert Lee Stephens (R. 109-110), who recognized that there are " . . . legal points involved, and necessarily decided by, the District Court in the dismissal order that warrant a review by the Court duly constituted for such purpose" (R. 110). The circuit court of appeals affirmed the order of the district court on the ground that petitioner had not exhausted his state remedies, thus refusing to examine into the merits (R. 121-125).

### B. Previous History of the Litigation.

Petitioner and Harry White were indicted on March 14, 1944, by the Los Angeles County Grand Jury and accused in Count One of conspiracy to cheat and defraud by criminal means, *and* to obtain money and property by false pretenses *and* by false promises with fraudulent intent not to perform such promises, *and* to commit grand theft.[2] In Counts Two to Eight inclusive, they were accused of the substantive offenses of grand theft. They were found guilty on all counts. White was placed on probation but petitioner under the name of "James Margolis" was sentenced to imprisonment in the state prison "for the term prescribed by law." The sentences on Counts Two to Eight inclusive were ordered to run concurrently but consecutively to the sentence on Count One[3] (R. 3-4, 17, 31-32).

Petitioner appealed to the California District Court of Appeal, which affirmed the convictions on all counts (R. 5,

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[2] Count One was based on California Penal Code, Sec. 182, paragraphs 1 and 4, Appendix, *infra*, pp. 17-18. Count One is in the conjunctive; the offenses specified in the paragraphs of Sec. 182 involved are in the disjunctive. The verdict of the jury was general, finding petitioner guilty "as charged in Count 1" (R. 15). See *infra*, p. 13.

[3] The theory of the indictment and prosecution was that certain unimproved parcels of land in the San Joaquin Valley were sold by the use of false pretenses and false promises, the alleged false pretense being a representation that the land was potential oil land. The land was authorized to be sold as potential oil land by the Real Estate Commissioner of California, who issued a permit allowing such sales to the general public (R. 3).

32; *People* v. *Gordon*, 71 Cal. App. (2d) 606, 163 P. (2d) 110). A rehearing was denied. Petitioner then petitioned the Supreme Court of California for a hearing which was also denied, although two justices voted that a hearing be granted (R. 5).

Petitioner in the California District Court of Appeal moved to recall its remittitur, alleging among other reasons that the court "in affirming the judgments of conviction did so under a mistake and misapprehension of the actual facts contained in the trial record" (R. 5-6). This motion was summarily denied on the day it came on for hearing, without permitting petitioner to discuss the specifications of misstatement of facts, with the general statement that it is "the policy of the law to put an end to litigation even though a mistake may have been made" (R. 6). Petitioner thereupon applied for a hearing in the Supreme Court of California to review the order denying recall of the remittitur, but the Supreme Court denied a hearing on this petition without opinion (R. 6).

On August 6, 1946, petitioner petitioned the Supreme Court of California for a writ of habeas corpus (R. 6, 31-73), which denied the petition on August 19, 1946, without rendering an opinion or in any way indicating the basis for its denial[4] (R. 7). Thereafter the present proceedings were commenced.[5]

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[4] There is apparently no claim here that any state remedy other than habeas corpus was available, or that the Supreme Court of California was not the appropriate state forum. The brief below of the respondent makes no such claim, and the opinion of the circuit court of appeals does not consider such a possibility (R. 121-125). Cf. Williams v. Kaiser, 323 U. S. 471, 473, 477.

[5] An application for habeas corpus made when petitioner was incarcerated in the Northern District of California was denied by the United States District Court therein (R. 29-30).

### C. The Invalidity Under the Fourteenth Amendment of Petitioner's Imprisonment.

Petitioner's petition for habeas corpus in this proceeding (R. 2-30), as well as his previous application to the California Supreme Court (R. 31-73), states prejudicial denial to him of the due process of law and equal protection of the laws guaranteed by the Fourteenth Amendment, which vitiates the convictions on all eight counts.[6]

In respect of Counts Two to Eight inclusive, the petition states that petitioner was denied the right of appeal accorded generally by the Constitution and laws of California in that the California District Court of Appeal (i) as respects Counts Two to Five inclusive, applied to petitioner evidence expressly excluded as to him (R. 8-9, 35-36), (ii) as respects Counts Six and Seven, assumed testimony not in the record (R. 9-11, 37-39), and (iii) as respects Count Eight, stated that testimony was given by one person when in fact it was given by another, and misstated that certain testimony was corroborated when in fact it was not (R. 11-14, 39-41). The petition alleges that these misstatements deprived petitioner of the benefit of favorable rules of California law,[7] the opportunity of obtaining the California Supreme Court's consideration of review, and accorded petitioner merely the form and not the substance of the right of appeal guaranteed him by the California Constitution and laws (R. 9, 11, 13).

The petition states that the conviction on Count One is likewise void because of denial of the right of appeal, in that the only transactions upon which such conviction could be

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[6] No hearing having yet been had on the facts alleged in the petition for habeas corpus, such facts must of course be taken as true. But over and above this presumption, it is to be remembered that the facts alleged would here be proved not by self-serving testimony of questionable reliability or accuracy, but by the *written words of the trial transcript* as measured against the *written opinion* of the California District Court of Appeal.

[7] That these favorable rules were of vital and probably controlling importance to petitioner, see *infra*, p. 12.

predicated are the seven transactions involved in the seven counts vitiated for the reasons stated in the preceding paragraph [8] (R. 25-26, 46-48).

The petition further states that the conviction on Count One is also void because it is dependent on a California law which, as here applied, is so vague, indefinite and uncertain as to deny petitioner due process of law (R. 14-18), because the judgment directs a sentence of imprisonment "for the term prescribed by law" (R. 17) and such term was not ascertained and cannot be known (R. 4-5, 15-19) and because irrelevant prejudicial evidence, designed to prejudice petitioner, was admitted over his objection (R. 26-29).

### D. Action of the Courts Below.

The district court and circuit court of appeals failed to consider the merits of petitioner's claim, basing their action instead on the ground that petitioner had not exhausted his state remedies because he had not sought certiorari of this Court following the denial of habeas corpus by the Supreme Court of California (R. 88-97, 121-125).[9]

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[8] As respects Count One, the petition alleges that the right of appeal was denied for the reason, in addition to those expressly set forth in both the California and instant habeas corpus proceedings, that by virtue of the misstatement of facts by the California District Court of Appeal, petitioner was precluded from showing that the California indictment and pre-trial proceedings, considered in their totality, denied him due process and equal protection in failing to inform him of the basis of the conspiracy count and in denying him opportunity of preparing his defense (R. 19-25).

[9] The district judge also referred generally to policies and principles respecting federal interference with state administration of justice (R. 91, 96-97). His view that the writ is available in the federal court only "in rare cases where exceptional circumstances or peculiar urgency are shown to exist" (R. 96) is clearly inapposite where, as here, state remedies have been exhausted. Ex Parte Hawk, 321 U. S. 114, 117-118.

**SPECIFICATION OF ERRORS TO BE URGED**

The Circuit Court of Appeals for the Ninth Circuit erred:

1. In holding that petitioner had not exhausted his state remedies.

2. In failing to consider or pass upon the legal validity of petitioner's claims.

3. In failing to hold that the allegations of petitioner's petition for writ of habeas corpus, if true, require petitioner's discharge.

4. In failing to order that a writ of habeas corpus be granted petitioner.

5. In failing to order that a hearing be had to determine whether the allegations of petitioner's petition for writ of habeas corpus are true.

6. In affirming the order of the district court discharging the order to show cause and denying the petition for writ of habeas corpus.

**REASONS FOR GRANTING THE WRIT OF CERTIORARI**

**I**

THE CIRCUIT COURT OF APPEALS HAS DECIDED AN IMPORTANT FEDERAL QUESTION IN A WAY IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.

The circuit court of appeals held that petitioner had not exhausted his state remdies because, following denial of his petition for habeas corpus in the California Supreme Court, he had not sought certiorari from this Court. In so holding, the circuit court of appeals decided this case in a way in conflict with applicable decisions of this Court.

It is neither necessary nor proper to apply to this Court for a writ of certiorari in order to exhaust state remedies where, as here (R. 7), the highest state court having jurisdiction to issue a writ of habeas corpus which raises federal questions, denies an application therefor without considering and adjudicating its merits and without rendering an

opinion or otherwise indicating the grounds for its denial. *White* v. *Ragen*, 324 U. S. 760; cf. *House* v. *Mayo*, 324 U. S. 42; *Woods* v. *Nierstheimer*, 328 U. S. 211; see *Lynch* v. *New York*, 293 U. S. 52, 54.

Petitioner's petition for habeas corpus to the California Supreme Court relied on both federal and state grounds (R. 31-73). It was denied without opinion or any indication of the basis of denial (R. 7). Following such denial, it was neither necessary nor appropriate to petition this Court for certiorari, and the court below has therefore decided this case directly contrary to controlling decisions of this Court.[10]

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[10] It is submitted that the basic fallacy underlying the conclusion by the court below that petitioner did not exhaust his state remedies, is its assumption that because federal questions were *presented* to the state court such court *necessarily decided* such questions and predicated its judgment thereon. The logical conclusion of such assumption is that, to exhaust state remedies, a party must *always* seek certiorari of this Court following denial of a petition presenting federal claims in a state proceeding. This assumption is therefore directly at variance with the basic philosophy of this Court's review of state cases—that, to justify review by this Court, it must *appear affirmatively from the record*, that a federal question was actually decided. " . . . jurisdiction cannot be founded upon surmise." See Lynch v. New York, 293 U. S. 52, 54. Such assumption would seem to place the Ninth Circuit essentially in conflict with the Seventh Circuit. Cf. Potter v. Dowd, (C. C. A. 7) 146 F. (2d) 244, where failure to petition for certiorari before proceeding in federal court was excused because of the personal circumstances of the petitioner. That the circuit court of appeals' assumption is here as groundless factually as it is untenable legally, appears from consideration of the possible state grounds upon which the California Supreme Court may have acted. For example, it may have denied the petition on the state ground that under the circumstances it would not go behind that judgment, Ex Parte Hickey, 3 Cal. App. (2d) 502, 39 P. (2d) 869, or because as a matter of state law the attack here is not considered "extrinsic to the record," Ex Parte Mooney, 6 Cal. App. (2d) 730, 45 P. (2d) 388; cf. Ex Parte Mooney, 10 Cal. (2d) 1, 73 P. (2d) 554, or because the invalidity here did not appear "upon the face of the judgment," Ex Parte Murphy, 79 Cal. App. 64, 248 Pac. 1044.

## II

### Constitutional Questions of Grave Importance are Presented.

#### *A. California, in violation of the Fourteenth Amendment, denied petitioner his right of appeal.*

The right of appeal is an integral part of the legal process of California (R. 75-76). In *Wuest* v. *Wuest*, 53 Cal. App. (2d) 339, 345, 127 P. (2d) 934, 936, it was said:

> "The right of appeal is as sacred and inviolable as the right to a trial, and when by judicial oppression such right is violated or vitiated, the guaranteed and substantial rights of a party have been materially affected thereby."

Petitioner under the California Constitution and laws had the absolute right of appeal to the district court of appeal, California Constitution, Article VI, Section 4b; California Penal Code, Section 1237; Appendix, *infra*, pp. 16-17, and the right to a hearing in the Supreme Court in the event that his case was "ordered by the Supreme Court to be transferred to itself for hearing and decision" California Constitution, Article VI, Section 4, Appendix, *infra*, p. 16.

California discriminatively has denied the substance of the right of appeal to petitioner, in violation of the due process of law and the equal protection of the laws.

The palpable and patent misstatements of facts by the district court of appeal, whereby evidence excluded as to petitioner was applied to him, testimony not in the record was assumed, testimony given by one was attributed to another and testimony not corroborated was misstated to have been corroborated[11] (R. 8-14, 35-41), denied petitioner the benefit of important favorable California rules, and of the opportunity of a hearing in the California Supreme Court[12] by virtue of its rule that it will not go behind

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[11] See *infra*, pp. 6-7.

[12] Petitioner's confinement having resulted from the district court of appeal's affirmance which was predicated on these misstatements,

the statement of facts contained in an opinion of a district court of appeal if the opinion contains a correct statement of the law based upon the facts contained therein[13] (R. 9, 33-34, 78). It is therefore submitted that the California proceedings, considered in their totality, denied appeal in violation of the Fourteenth Amendment.

The right of appeal, when integrated by a state into its legal process, cannot, consistently with the Fourteenth Amendment, be arbitrarily withheld from a particular defendant or unreasonably or discriminatively curtailed. *Cochran* v. *Kansas*, 316 U. S. 255; cf. *Boykin* v. *Huff*, (App. D. C.) 121 F. (2d) 865, 872.

"Equal protection of the laws" requires "that all persons . . . should have like access to the courts of the country for the protection of their persons." *Barbier* v. *Connolly*, 113 U. S. 27, 31. Here, petitioner was accorded merely the form and not the substance of the right of review, and this

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such misstatements, of themselves, would seem to have resulted in confinement in violation of the Fourteenth Amendment, especially since it is the law in California that a decision of an appellate court which is based on a misstatement or omission of material facts is a nullity (R. 54-55, 75-76). We do not here have a case of mere error on appeal. However, petitioner here emphasizes not only the misstatements but the ultimate results produced by their operation in *conjunction with* California appellate procedure. See n. 13, *infra*.

[13] Although one of California's judges has said of this rule, "Since the adoption of the above-mentioned procedural policy, grave doubt has arisen in the minds of many members of the legal profession and I daresay of some of the members of this Court, as to whether such policy has not been the means of grave injustice being done to litigants in numerous cases because of the failure of some District Courts of Appeal to furnish a correct statement of facts in their opinions which come before this Court for review." (R. 79), it is not the rule *per se*, but its operation in a situation where, as here, the district court of appeal has made palpable and patent misstatements, that petitioner emphasizes as resulting in confinement in violation of the Fourteenth Amendment.

discrimination [14] denied him the equal protection of the laws.[15]

Further, the arbitrary deprivation, as here, of the substance of the right of appeal denies due process. See *State* v. *Guerringer*, 265 Mo. 408, 416-417, 178 S. W. 65, 67; *Wuest* v. *Wuest, supra; Ex Parte Sharp,* (D. C. Kansas) 33 Fed. Supp. 464.

That severe prejudice resulted to petitioner from the discriminatory denial of the substance of appeal is clear: such denial deprived petitioner of the benefits of the California rules that evidence which has been excluded as to a particular defendant cannot be considered against him (R. 9, 79-80), that no person can be convicted of the crime of defrauding by means of a false pretense unless there is corroboration, and that such a crime cannot be predicated upon an alleged misrepresentation not testified to by the victim [16] (R. 13, 57, 80-82). Such discriminatory denial of appeal does not meet the tests of the Fourteenth Amendment.[17]

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[14] To establish the discrimination, it is not necessary for petitioner to show that others were given what he was denied because, in the absence of proof to the contrary, it is presumed that the laws of the state are properly administered. Utah Power & Light Co. v. Pfost, 286 U. S. 165, 190.

[15] As was said in petitioner's brief in Cochran v. Kansas, *supra*, it "seems unnecessary to seek to fit the discrimination here alleged precisely into any of the categories recognized in the cases. Whether their discriminatory acts be deemed 'invidious', Soon Hing v. Crowley, 113 U. S. 703, 708 (1885), or 'unjust and illegal', Yick Wo v. Hopkins, 118 U. S. 356, 374 (1866), or 'intentional and arbitrary', Sunday Lake Iron Co. v. Wakefield, 247 U. S. 350, 352 (1918)," (p. 26), the final result was to deny petitioner the substance of his right of appeal.

[16] It seems clear that these rules might well have been of controlling importance. It is to be remembered that the right of appeal was denied in respect of all eight counts. See *supra*, pp. 6-7.

[17] It is of course clear that the right of appeal as here denied could not have been vindicated in the very proceeding in which it was wrongfully denied; necessarily, it must be vindicated in a collateral attack, here, habeas corpus. Cf. Cochran v. Kansas, 316 U. S. 255.

### *B. CALIFORNIA OTHERWISE VIOLATED THE FOURTEENTH AMENDMENT.*

Count One having alleged conjunctively violations of all the clauses of the paragraphs of the statute[18] relied upon (R. 15, 20), and the verdict on Count One having been a general one (R. 15), in consequence of which it is impossible to exclude any clause stated in the Count as one upon which the jury might have relied, it necessarily follows that the conviction must fall if any clause is void. *Stromberg* v. *California,* 283 U. S. 359; *Williams* v. *North Carolina,* 317 U. S. 287, 292; *Cramer* v. *United States,* 325 U. S. 1, 36. One of such clauses, "To cheat and defraud any person of any property, by any means which are in themselves criminal," as here applied is so vague, indefinite and uncertain as to be violative of due process, especially where, as here, there is nothing else in the state law to give the expression meaning (R. 14-15), and where, as here, there was not even an attempt to tell the jury what it means (R. 17). *Connally* v. *General Const. Co.,* 269 U. S. 385; *Lanzetta* v. *New Jersey,* 306 U. S. 451; *Stoutenburgh* v. *Frazier,* 16 App. D. C. 229.

Moreover, there having been no ascertainment of, and it being impossible judicially to know, which of the clauses of Count One the jury relied upon in convicting (R. 15-19), and the permissible punishment varying, depending upon the clause relied upon, from (i) a minimum of one year and a maximum of ten years to (ii) a minimum of six months and a maximum of two years[19] (R. 4-5, 16), it was impos-

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[18] Sec. 182, paragraphs 1 and 4, California Penal Code, Appendix, *infra,* pp. 17-18. Note that paragraph 4, which contains three of the clauses relied on in Count One, is in the disjunctive. See n. 2, p. 4, *supra.*

[19] Two of the clauses of Count One, "to obtain money and property by false pretenses" and "to commit grand theft" (R. 15, 20), carry sentences of not less than one nor more than ten years by virtue of California Penal Code, Secs. 182, 484, and 489, considered together (R. 4-5, 16). The other two clauses of Count One, "to cheat and defraud by criminal means" and "[to obtain money and property] by false promises, with fraudulent intent not to perform

sible, consistently with due process and equal protection, to impose on the basis of the general verdict here rendered on Count One (R. 15), the sentence actually imposed, that petitioner "be punished by imprisonment in the State Prison **for the term prescribed by law**" (R. 17). Under these circumstances, the "term prescribed by law" cannot be known, and the sentence is void.[20] Cf. *Smith* v. *United States*, (C. C. A. 10) 145 F. (2d) 643, cert. denied 323 U. S. 803.

Lastly, it would seem that the introduction of prejudicial irrelevant evidence, designed to prejudice, as here (R. 27), violates due process. Cf. *Mooney* v. *Holohan*, 294 U. S. 103; *Hysler* v. *Florida*, 315 U. S. 411, 413.

The vital importance of these Constitutional questions need not be labored in view of the solicitude of this Court for the preservation of the fundamentals of due process and equal protection. Judges of the United States cannot, consistently with the Constitution, avoid passing upon these questions where, as here, they are raised in an appropriate proceeding. Cf. *Moore* v. *Dempsey*, 261 U. S. 86, 92 (opinion by Mr. Justice Holmes).

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such promises" (R. 15, 20), not being substantive offenses in California (R. 16), carry sentences of not less than six months nor more than two years by virtue of California Penal Code, Secs. 18a and 182, considered together (R. 4-5, 16). The Penal Code sections primarily involved in this case appear in the Appendix, *infra*, pp. 17-18.

[20] The fact that in California not the court, but the Adult Authority, a non-judicial body, fixes the sentence within the limits of the prescribed minimum and maximum, would seem to accentuate this conclusion. In any event, the fact that the actual sentence is fixed by a non-judicial body cannot relieve the state from the obligation of complying with due process in ascertaining the offense for which sentence is to be fixed.

## CONCLUSION

Wherefore it is respectfully requested that this petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit be granted.

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## APPENDIX

### California Constitutional Provisions.

Article VI, Section 4:

> The Supreme Court shall have appellate jurisdiction on appeal from the Superior Courts in all cases in equity, except such as arise in Municipal or Justices' Courts; also, in all cases at law which involve the title or possession of real estate, or the legality of any tax, impost, assessment, toll, or municipal fine; also, in all such probate matters as may be provided by law; also, on questions of law alone, in all criminal cases where judgment of death has been rendered; *the said court shall also have appellate jurisdiction in all cases, matters and proceedings pending before a District Court of Appeal, which shall be ordered by the Supreme Court to be transferred to itself for hearing and decision, as hereinafter provided.* The said court shall also have power to issue writs of mandamus, certiorari, prohibition, and habeas corpus, and all other writs necessary or proper to the complete exercise of its appellate jurisdiction. Each of the justices shall have power to issue writs of habeas corpus to any part of the State, upon petition by or on behalf of any person held in actual custody, and may make such writs returnable before himself or the Supreme Court or before any District Court of Appeal, or before any justice thereof, or before any Superior Court in the State, or before any judge thereof. (Italics added)

Article VI, Section 4b:

> The District Courts of Appeal shall have appellate jurisdiction on appeal from the Superior Courts (except in cases in which appellate jurisdiction is given to the Supreme Court) in all cases at law in which the Superior Courts are given original jurisdiction; also, in all cases of forcible or unlawful entry or detainer (except such as arise in Municipal, or in Justices' or other inferior courts); in proceedings in insolvency; in actions to prevent or abate a nuisance; in proceedings of mandamus, certiorari, prohibition, usurpation of office, removal from office, contesting elections, eminent domain, and in such other special proceedings as

may be provided by law; *also, on questions of law alone, in all criminal cases prosecuted by indictment or information,* except where judgment of death has been rendered.

The said Courts shall also have appellate jurisdiction in all cases, matters, and proceedings pending before the Supreme Court which shall be ordered by the Supreme Court to be transferred to a District Court of Appeal for hearing and decision. The said courts shall also have power to issue writs of mandamus, certiorari, prohibition and habeas corpus, and all other writs necessary or proper to the complete exercise of their appellate jurisdiction. Each of the Justices thereof shall have power to issue writs of habeas corpus to any part of his appellate district upon petition by or on behalf of any person held in actual custody, and may make such writs returnable before himself or the District Court of Appeal of his district, or before any Superior Court within his district, or before any Judge thereof. (Italics added)

## Statutes

### Penal Code Of California.

Section 1237:

An appeal may be taken by the defendant:

1. From a final judgment of conviction;

2. From an order denying a motion for a new trial;

3. From any order made after judgment, affecting the substantial rights of the party. (Enacted 1872.)

Section 182*:

If two or more persons conspire:

1. To commit any crime;

2. Falsely and maliciously to indict another for any crime, or to procure another to be charged or arrested for any crime;

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*This section was amended in 1943 but the statute as here printed, and not as amended, is applicable in this case.

3. Falsely to move or maintain any suit, action or proceeding;

4. To cheat and defraud any person of any property, by any means which are in themselves criminal, or to obtain money or property by false pretenses or by false promises with fraudulent intent not to perform such promises;

5. To commit any act injurious to the public health, to public morals, or to pervert or obstruct justice, or the due administration of the laws.

They are punishable as follows:

When they conspire to commit any felony, or to commit any act injurious to the public health, or to public morals, or tending to pervert or obstruct justice, or the due administration of the laws, they shall be punishable in the same manner and to the same extent as in this code provided for the punishment of the commission of the said felony or act, respectively.

When they conspire to do any of the other acts described in this section they shall be punishable by imprisonment in the county jail or state penitentiary not exceeding two years, or by a fine not exceeding five thousand dollars, or both, and cases of such conspiracy may be prosecuted and tried in the superior court of any county in which any overt act tending to effect such conspiracy shall be done. (Enacted 1872; Am. Code Amdts. 1873-74, p. 426; Stats. 1919, p. 170.)

Section 489:

Grand theft is punishable by imprisonment in the state prison for not less than one nor more than ten years. (Enacted 1872; Am. Stats. 1927, p. 1047.)

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1947.

No. 411

JAMES M. GORDON,

*Petitioner,*

*vs.*

KENYON J. SCUDDER, Superintendent of the California Institute for Men, Located at Chino, California,

*Respondent.*

## RESPONDENT'S OPPOSING BRIEF.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1947.

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JAMES M. GORDON,

*Petitioner,*

*vs.*

KENYON J. SCUDDER, Superintendent of the California Institute for Men, Located at Chino, California,

*Respondent.*

## RESPONDENT'S OPPOSING BRIEF.

Petitioner seeks a review by this Honorable Court of a decree of the United States Circuit Court of Appeals for the Ninth Circuit affirming an order of the District Court of the United States for the Southern District of California, Central Division, discharging order to show cause and denying petition for writ of habeas corpus. [R. 93, 126.] Petitioner claims that the decision of said United States Circuit Court of Appeals conflicts with applicable decisions of this Honorable Court. (Page 8 of Petition.)

## Statement of the Case.

Petitioner filed with the District Court of the United States for the Southern District of California, Central Division, a petition for a writ of habeas corpus, contending that he is being illegally imprisoned in a prison of the State of California at Chino, San Bernardino County, in violation of the Fourteenth Amendment of the Constitution of the United States in that he was denied the right of appeal, the state statute under which he was convicted is vague and uncertain, he was not informed of the basis of the offense charged against him nor given an opportunity to prepare his defense thereto, and denied a fair and impartial trial because evidence of purported crimes of which he was not accused was permitted to be introduced. [R. 2, 3.] He alleged that he appealed his conviction to the District Court of Appeal of the State of California, Second Appellate District, which affirmed the judgment of conviction (*People v. Gordon*, 71 Cal. App. (2d) 606, 163 P. (2d) 110), that his petition for rehearing by that court was denied and his petition for a hearing in the Supreme Court of California was denied, that he moved the said District Court of Appeal to recall its remittitur and this motion was denied, that his application to the Supreme Court of California to review said order of the District Court of Appeal was denied, that he applied to the Supreme Court of California for a writ of habeas corpus and the same was denied without opinion, that while imprisoned in the State Prison at San Quentin, Marin County, California, he applied to the United States District Court in and for the Northern District of California for a writ of habeas corpus upon the same grounds and that his application was denied, as well as his request

for the issuance of an order to show cause. [R. 5, 6, 7, 29, 30.]

Honorable Jacob Weinberger, Judge of the District Court of the United States for the Southern District of California, Central Division, issued an order to show cause why a writ of habeas corpus as prayed for should not issue. [R. 87.] After the matter had been fully presented by the filing of points and authorities and oral argument by the respective parties, the court stated its conclusions [R. 88], and ordered the discharge of the order to show cause and denied the petition for a writ of habeas corpus. [R. 93.]

Honorable Albert Lee Stephens, Judge of the United States Circuit Court of Appeals for the Ninth Circuit allowed an appeal to that court. [R. 110.] Following submission of the cause for consideration and decision [R. 119], the court rendered an opinion affirming the order of the lower court [R. 121-125] and in conformity therewith filed and entered its decree. [R. 126.]

The order of the lower court was affirmed upon the ground that petitioner had not exhausted his remedies in the state courts, including such remedies as he may have by appeal or application for a writ of certiorari to the Supreme Court of the United States. [R. 123.] In so holding, the court considered and construed the law as laid down by the Supreme Court of the United States in *Ex parte Hawk*, 321 U. S. 114, *White v. Ragen*, 324 U. S. 762, *Urquhart v. Brown*, 205 U. S. 179, *Williams v. Kaiser*, 323 U. S. 482, *De Saussure v. Gaillard*, 127 U. S.

216, 234, and *Johnson v. Risk,* 137 U. S. 300. The court concluded that, since California has no rule relative to hearings on petitions for habeas corpus such as exists in Illinois, the judgment of the Supreme Court of California denying the writ without opinion could not have been rendered without deciding the question of whether petitioner had been denied rights guaranteed by the Fourteenth Amendment, although the petition also presented non-federal questions.

In his petition filed with the Supreme Court of California, petitioner alleged (1) that he was denied his constitutional right of appeal in violation of the provisions of Article VI, Section 4, of the California Constitution, and was denied due process of law guaranteed to him by the provisions of Article I, Section 13, of the California Constitution and the Fourteenth Amendment to the United States Constitution in that the written decision of the District Court of Appeal of the State of California affirming the judgments of conviction incorrectly stated the evidence and omitted material facts appearing in the transcript of the evidence, attributed testimony to the complaining witnesses which in truth and in fact was not given by them, referred to and relied upon evidence which was excluded as to this defendant and received only as against his co-defendant in affirming the convictions as to four of the seven counts of grand theft and in affirming the conviction on the conspiracy count [R. 32, 33]; (2) that Section 182 of the Penal Code is unconstitutional and void in that it does not contain a definition of the

cause "to cheat and defraud by means which are in themselves criminal" nor does it establish the elements constituting such crime and is vague and uncertain; (3) that the judgment of conviction on the conspiracy count was and is void in that the verdict of the jury does not disclose whether defendant was found guilty of a conspiracy to cheat and defraud by means which are in themselves criminal, or a conspiracy to obtain money or property by false pretenses, or of a conspiracy to obtain money or property by false promises with fraudulent intent not to perform such promises, or of a conspiracy to commit grand theft [R. 42]; (4) that the trial court did not have jurisdiction to impose a judgment of imprisonment on the conspiracy count in that there was no proof of the existence of a conspiracy within three years of the return of the indictment [R. 46]; and (5) that defendant was denied his constitutional right to a fair and impartial trial guaranteed to him by Article 1, Section 13 of the California Constitution and the Fourteenth Amendment to the United States Constitution in that the trial court, over objections, permitted the introduction of evidence tending to show the commission by defendant of offenses of which he was not accused. [R. 48.]

## Question Presented.

Does the decision rendered herein by the United States Circuit Court of Appeals for the Ninth Circuit conflict with applicable decisions of the Supreme Court of the United States?

## Argument.

The decision of the United States Circuit Court of Appeals for the Ninth Circuit is not in conflict with applicable decisions of the Supreme Court of the United States. The decision states:

> ". . . From the face of the petition (filed with Supreme Court of California) it affirmatively appears that a federal question was presented, viz.: that appellant had been deprived of certain rights guaranteed by the Fourteenth Amendment to the Constitution of the United States. The petition also charged that appellant had been deprived of certain rights guaranteed him by the state constitution of California. Thus on the face of the petition federal and non-federal questions appear and a decision as to each was necessary to the determination of the cause. A decsion that in appellant's trial no right under the state constitution had been denied him would still leave demanding attention and decision the question of whether appellant had been denied rights guaranteed by the Fourteenth Amendment and the judgment denying the writ could not have been rendered without deciding it." [R. 125.]

It is apparent from a mere cursory examination of the petition filed with the Supreme Court of California for a writ of habeas corpus that the judgment denying the writ could not have been rendered without deciding the federal questions. For instance, the petition alleges:

> "That defendant was denied his constitutional right of appeal in violation of the provisions of Article VI, Section 4, of the California Constitution, and was denied due process of law guaranteed to him by the provisions of Article I, Section 13, of

the California Constitution and the Fourteenth Amendment to the United States Constitution in that the written decision of the District Court of Appeal affirming the judgments of conviction (1) incorrectly stated the evidence and omitted material facts appearing in the transcript of the evidence; (2) attributed testimony to the complaining witnesses which in truth and in fact was not given by them; (3) referred to and relied upon evidence which was excluded as to this defendant and received only as against his co-defendant in affirming the convictions as to four of the seven counts of grand theft and in affirming the conviction on the conspiracy count." [R. 32, 33.] "That defendant was denied his constitutional right to a fair and impartial trial guaranteed to him by Article I, Section 13 of the California Constitution and the Fourteenth Amendment to the United States Constitution in that the trial court, over objections, permitted the introduction of evidence tending to show the commission by defendant of offenses of which he was not accused." [R. 48.]

So far as we have observed, the above are the only federal questions presented by the petition filed with the Supreme Court of California for a writ of habeas corpus. By the manner in which the federal and non-federal questions were pleaded the judgment could not have been rendered without deciding all of these questions. It is practically impossible to segregate the federal from the non-federal questions. The fact that the petition was denied by the Supreme Court of California without opinion, or any indication of the basis of the denial, did not in and of itself deprive the Supreme Court of the United States of jurisdiction to grant certiorari. The

cases of *White v. Ragen,* 324 U. S. 760; *House v. Mayo,* 324 U. S. 42; *Woods v. Nierstheimer,* 328 U. S. 211, and *Lynch v. New York,* 293 U. S. 52, 54, cited by petitioner on page 9 of his petition, do not so hold.

The opinion rendered herein by the United States Circuit Court of Appeals for the Ninth Circuit correctly construes the decision of the Supreme Court of the United States in *White v. Ragen, supra,* (324 U. S. 760). The opinion states "that where the Supreme Court of the United States is asked to review a petition for habeas corpus denied by the Supreme Court of Illinois without opinion and said petition presents on its face questions of fact, it, the Supreme Court of the United States, cannot say that the denial of the writ by the Supreme Court of Illinois did not rest upon an adequate non-federal ground," because of a rule adopted by the Supreme Court of Illinois to the effect that said court will not consider petitions for habeas corpus wherein questions of fact are relied on. [R. 124.] The Supreme Court of California, as the opinion of the United States Circuit Court of Appeal for the Ninth Circuit points out [R. 125], has no such rule.

The remedy of habeas corpus is available in the State of California for the protection and enforcement of constitutional rights even where questions of fact are raised by the petition. In such cases a referee is appointed by the Supreme Court of California to take evidence and submit findings.

*In re Ward,* 28 Cal. (2d) 583, 170 P. (2d) 665;

*In re Marvich,* 27 Cal. (2d) 503, 165 P. (2d) 241;

*In re Mooney,* 10 Cal. (2d) 1, 15, 73 P. (2d) 554, 561.

In *House v. Mayo,* 324 U. S. 42, cited by petitioner, the District Court of the United States did not reach the question whether petitioner had exhausted his state remedies, a prerequisite to relief by habeas corpus in the federal courts, but rested its decision wholly on different grounds. One of the grounds reached by the District Court in the case at bar was, "The petitioner has not exhausted all state remedies available to him which include appellate remedies to the Supreme Court of the United States by appeal or certiorari." [R. 92.] Another distinguishing feature is that it appeared from the record in *House v. Mayo* that the remedy sought in the Supreme Court of Florida was not the appropriate one under Florida law.

In *Woods v. Nierstheimer,* 328 U. S. 211, cited by petitioner, the court said:

> "Since the record thus shows that petitioner's applications for a writ of habeas corpus were probably denied because he did not seek the proper remedy under Illinois law, it does not appear that the judgments we are asked to review do not rest on an adequate non-federal ground."

In *Lynch v. New York,* 293 U. S. 52, cited by petitioner, it is stated:

> "It is essential to the jurisdiction of this Court in reviewing a decision of a court of a state that it must appear affirmatively from the record, not only that a federal question was presented for decision to the highest court of the state having jurisdiction, but that its decision of the federal question was necessary to the determination of the cause, and that it was actually decided or that the judgment as rendered could not have been given without deciding it."

No contention is made by petitioner herein that a decision on the federal questions was not necessary to the determination of the cause by the Supreme Court of California. But petitioner states that, "It is submitted that the basic fallacy underlying the conclusion by the court below that petitioner did not exhaust his state remedies, is its assumption that because federal questions were presented to the state court such court necessarily decided such questions and predicted its judgment thereon." (Page 9, petition.) From the manner in which the federal and non-federal questions were presented by the petition for a writ of habeas corpus filed with the Supreme Court of California, as hereinabove pointed out, it is not fair to state that the United States Circuit Court of Appeals for the Ninth Circuit assumed from the mere fact that federal questions were presented they were necessarily decided. Such an assumption dehors the record.

In concluding this point, we respectfully submit that the decision of the court below in nowise conflicts with applicable decisions of this Honorable Court.

The other matters set forth in appellant's petition for a writ of certiorari, namely, that California, in violation of the Fourteenth Amendment, denied petitioner his right of appeal and otherwise violated said amendment (Petition, pp. 10, 13), are foreign to the question of whether or not the decision of the United States Circuit Court of Appeals for the Ninth Circuit conflicts with applicable decisions of the Supreme Court of the United States.

We have hereinabove pointed out that the only federal questions presented to the Supreme Court of California were (1) that petitioner was denied his constitutional right of appeal in violation of the due process of law

clause of the Fourteenth Amendment because the District Court of Appeal of California, in affirming the judgments of conviction (*People v. Gordon*, 71 Cal. App. (2d) 606, 163 P. (2d) 110), incorrectly stated the evidence, etc., and (2) that petitioner was denied his constitutional right to a fair and impartial trial in violation of the Fourteenth Amendment because evidence tending to show the commission by defendant of offenses of which he was not accused were introduced into evidence over his objections.

These matters were not mentioned by the United States Circuit Court of Appeals for the Ninth Circuit in its decision. The only possible relevancy they could have to the granting of the petition herein is that said matters present a rare and exceptional case of peculiar urgency justifying the interference by a federal court of the due and orderly administration of justice by the state courts of California.

A state cannot be deemed guilty of a violation of its obligations under the Constitution of the United States because of a decision, even if erroneous, of its highest court, while acting within its jurisdiction.

> *Ex parte Converse*, 137 U. S. 624, 11 S. Ct. 191, 193.

The Constitution of the United States does not guarantee that the decisions of the state courts shall be free from error.

> *Worcester County Trust Co. v. Riley*, 302 U. S. 292, 58 S. Ct. 185, 188.

Federal courts do not sit to review the finding of facts made in the state court, but accept the findings of court of the state upon matters of fact as conclusive and confine their review to questions of federal law within the jurisdiction conferred upon them.

> *Waters-Pierce Oil Co. v. Texas,* 212 U. S. 86, 29 S. Ct. 220, 221.

In *Milk Wagon Drivers Union, etc. v. Meadowmoor Dairies,* 312 U. S. 287, 61 S. Ct. 552, 555, it is said:

> ". . . The place to resolve conflicts in the testimony and in its interpretation was in the Illinois courts and not here. To substitute our judgment for that of the state court is to transcend the limits of our authority. . . ."

In *Lisenba v. People of State of California,* 314 U. S. 219, 62 S. Ct. 280, 286, it is said:

> "Testimony was admitted concerning the death of James' former wife, on the widely recognized principle that similar but disconnected acts may be shown to establish intent, design, and system. The Fourteenth Amendment leaves California free to adopt a rule of relevance which the court below holds was applied here in accordance with the state's law."

Under the principles of law thus announced by this Honorable Court, it is clear that said matters do not present a rare and exceptional case of peculiar urgency justifying the interference by a federal court of the due and orderly administration of justice by the state courts of California.

## Conclusion.

We respectfully urge that the petition filed herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit be denied.

Respectfully submitted,

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